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IN THE

Supreme Court of the United States

October Term, 1979

No. .....
79-1400

GARY TOUGHILL,
MARGUERITE COSTANZA
and
SAUNDRA NAVARRO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition for GARY TOUGHILL, MARGUERITE COSTANZA and SAUNDRA NAVARRO for a writ of certiorari

to review the order made by the United States Court of Appeals for the Ninth Circuit on December 3, 1979, refusing to dismiss the indictment on double jeopardy grounds. The United States Court of Appeals for the Ninth Circuit ruled that as petitioners were charged with four separate offenses as defined by four distinct criminal statutes[1], the acquittal on the importation charges was not a bar to a retrial on the charges of conspiracy to possess and distribute and the substantive offense of possession with intent to distribute. The Ninth Circuit Court also ruled that there was no deliberate overreaching by the government prosecutor which would have barred retrial of the petitioners.

OPINION BELOW

To the petitioners' knowledge, the opinion in the United States Court of Appeals for the Ninth Circuit, affirming the denial of petitioners' motion to dismiss, has not been officially or unofficially reported as yet. (A copy of said opinion is attached hereto as Appendix "B".)

JURISDICTION

1. On August 16, 1978, the Federal Grand Jury for the Southern District of California returned a four-count indictment against petitioners and four other persons. A superseding indictment was thereafter filed on October 6,

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[1]For a full and complete text of the relevant statutes, see Appendix "A" attached hereto.

1978, again in four counts, charging a conspiracy under Title 21, United States Code Sections 952, 960 and 963, to import cocaine (count one); a conspiracy under Title 21, United States Code Sections 841(a)(1) and 846, to distribute cocaine (count three); and the substantive acts of importation and possession of cocaine with intent to distribute (counts two and four).

2. On December 5, 1978, a three-week trial commenced before the Honorable William B. Enright, at the conclusion of which the jury acquitted petitioners COSTANZA and NAVARRO of counts one and two, and petitioner TOUGHILL of count two but was unable to reach a verdict as to count one. The jury was also unable to reach a verdict as to all of the petitioners on counts three and four. When the government indicated it would retry the petitioners on counts three and four, a motion to dismiss the indictment on double jeopardy grounds was filed. The trial court denied this motion, but agreed to stay any further proceedings pending the resolution of an interlocutory appeal. Petitioners thereafter filed a timely Notice of Appeal.

3. On December 3, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the denial of petitioners' motion to dismiss, and on February 12, 1980, petitioners' Petition for Rehearing and Suggestion for Rehearing in Banc was denied by said court.

4. The jurisdiction of this Court is invoked under Title 21, U.S.C. Section 1254(1) and *Abney v. United States*, ... U.S. ....., 97 S. Ct. 2034 (1977).

QUESTIONS PRESENTED

1. Did the acquittal of petitioners on counts one and two of the indictment bar further prosecution on counts three and four under the double jeopardy provision of the United States Constitution?

2. Did the deliberate overreaching practiced by the government bar further prosecution of all petitioners?

3. What effect should a decision from a different panel of the same court, involving basically identical facts, have upon a decision rendered by another panel?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **Fifth Amendment to the United States Constitution.**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. Title 21, U.S.C. § 841(a)(1).

3. Title 21, U.S.C. § 846.

4. Title 21, U.S.C. § 952.

5. Title 21, U.S.C. § 960.

6. Title 21, U.S.C. § 963.

The foregoing statutes have been set forth in Appendix "A" attached hereto.

STATEMENT OF THE FACTS

Without the benefit of the transcript of the trial proceedings, petitioners' counsel are only able to provide the Court with a general summary of the evidence that was presented.

Some time in the latter half of 1973, at Sandstone Penitentiary in Minnesota, a Larry Eugene WEBER met petitioner GARY TOUGHILL and co-defendant KENNETH REUBEN KELSEY, who were serving time for the sale of cocaine. WEBER was told by KELSEY about a process for removing impurities from cocaine prior to distribution. KELSEY spoke of an individual in California who had developed the process and acted as the chemist, and another individual by the name of "JIMMY" who was a partner. KELSEY discussed the possibility of WEBER providing cocaine in the future, and WEBER gave KELSEY his telephone number where he could be reached after his release

from prison.

During the summer of 1975, WEBER was contacted at that telephone number by KELSEY, who wanted to know if WEBER knew a source in California for cocaine. WEBER thereafter flew to California and introduced KELSEY and co-defendant JAMES VINCENT MAMARA to an individual by the name of Rudy ESTRADA, who in turn introduced them to co-defendant CAESAR ALARID-ARAGON, a source for cocaine in Mexico. Arrangements were then made for ALARID to deliver shipments of cocaine to KELSEY's residence in the United States.

Beginning in August of 1975, representatives of ALARID delivered cocaine regularly from Mexico to KELSEY's residence at 29811 Disney Lane in Vista, California. Residing at the residence during this period were KELSEY, ESTRADA and his girlfriend, Priscilla RAMES. When the cocaine was delivered, it was taken into a back room where KELSEY or ESTRADA would test its quality. On occasion, MAMARA and co-defendant SALVATORE PEPE were also present. In November of 1975, WEBER received another telephone call from KELSEY, who stated that things were going well and that he should come back out. WEBER thereafter drove his motorhome to California and was thereafter present at KELSEY's residence when the cocaine was delivered.

If the cocaine was found to be satisfactory, it was driven by either KELSEY or MAMARA, usually accompanied by either ESTRADA, WEBER or PEPE, to a residence located at 2036 Stanley Hills Drive in Los Angeles, California. This residence had been rented by KELSEY's girlfriend, petitioner MARGUERITE COSTANZA. There,

the cocaine was broken down into smaller quantities and then delivered by KELSEY to co-defendant ROBERT EUGENE PRESTON at a secret laboratory located in Hollywood, California. PRESTON was the chemist who purified the cocaine by a laboratory process using Freon and other chemicals. After this purification process, the cocaine was brought back to the Stanley Hills residence by KELSEY, where it was packaged in small, glass vials by petitioner COSTANZA and petitioner SAUNDRA NAVARRO. The cocaine was then sold in the Hollywood area and elsewhere for approximately $100 per bottle.

Toward the end of 1975, the quality of the cocaine being delivered by ALARID became progressively worse. Finally, at the end of January of 1976, KELSEY terminated his dealings with ALARID. Then, in March of 1976, the Disney Lane residence was visited by Drug Enforcement Administration (DEA) agents who were looking for Roger Keith Davis, a federal fugitive. Shortly thereafter, the Disney Lane residence was vacated, WEBER returned to Minnesota, and the partnership between KELSEY, MAMARA, ESTRADA and PRESTON ended.

In April of 1976, KELSEY and his new girlfriend, SHEREEN GOUL, rented a residence located at 4951 San Yacinto Circle in Fallbrook, California. There, the cocaine operation continued, with the new source for cocaine apparently being an individual by the name of Lawrence PEBBLES. Petitioner TOUGHILL, who had now been released from prison, and co-defendant ROGER LEE BURKETT allegedly became KELSEY's new partners, and allegedly aided KELSEY in reprocessing the cocaine at the San Yacinto Circle residence.

On September 26, 1977, DEA agents proceeded to the San Yacinto Circle residence to serve an arrest warrant on a Ms. Lynn SENO. In connection with that arrest, a search warrant was obtained, and seized from the residence was laboratory equipment, packed in steamer trunks, which the government contended was used to reprocess the cocaine. Also seized during the search were various chemicals allegedly used for reprocessing cocaine and several thousand small glass vials. These were traced to several businesses in the Los Angeles area, from which business records for the purchases were obtained. Some of the defendants were identified by employees of these companies as purchasers of the chemicals or glass vials. Other defendants were identified by handwriting comparison with the purchase orders.

REASONS WHY THE WRIT SHOULD BE GRANTED

The fundamental nature of the Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this nation's independence. See *Barktus v. Illinois,* 359 U.S. 121, 151-155, 79 S. Ct. 676, 697 (1959) (Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this country through the medium of Blackstone, who codified the doctrine in his "commentaries." "[T]he plea of *autrefois acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of

his life more than once for the same offense." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court noted in *Green v. United States,* 355 U.S. 184, 187-188, 78 S. Ct. 221, 223 (1957), the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

In the instant case, it was petitioners' argument that further prosecution on the remaining counts of the indictment was barred by the Double Jeopardy Clause because of the method in which the government charged the case and argued the facts of the case to the jury. By alleging identical overt acts in furtherance of both conspiracy charges, the government, in reality, was saying that only a single over-all conspiracy existed to import and distribute cocaine in the Southern and Central Districts of California. Government counsel relied on this theory when presenting his case to the jury.[2] There was not a single instance in which he argued to the jury that certain evidence was being offered to support the importation charges as opposed to the distribution charges, or vice versa. Rather, government

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[2]Government counsel was forced to follow this approach because he knew from his own reports that there was no evidence indicating that these petitioners were involved in the conspiracy to import. It was thus the obvious hope that the evidence presented concerning the distribution charges would, in the minds of the jurors, "spill over" to the importation charges which dictated government counsel's strategy.

counsel continually merged the evidence in an attempt to prove one over-all conspiracy which each charged defendant participated in at one time or another. The acquittal on the first conspiracy count thus acted as a bar to any further prosecution of a second conspiracy count, because precisely the *same* evidence was presented by the government to prove both conspiracies.

The other courts that have recently dealt with this very issue have focused on the unfairness of the situation where the government arbitrarily divides a single conspiratorial agreement in such a way as to result in multiple counts in a single indictment or even separate indictments in different jurisdictions. Such cases as *United States v. Mallah,* 503 F.2d 971 (2nd Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S. Ct. 1425 (1975); *United States v. Ruigomez,* 576 F.2d 1149 (5th Cir. 1978); and *United States v. Cooper,* 442 F. Supp. 1259 (D. Minn. 1978), have recognized the difficulties a defendant encounters when raising this issue and have thus fashioned a more equitable test than the "same evidence" test by considering the *totality* of the circumstances rather than just whether the different charged offenses were supported by the same evidence. Again, this new test was adopted specifically because of the injustice the courts perceived a criminal defendant faced when combatting multiple prosecutions based upon a single offense.

In *United States v. Guido,* 597 F.2d 194 (9th Cir. 1979), a factually similar case to the one at bar, a panel of the Ninth Circuit Court of Appeals also recognized the unfairness of "prosecutorial overreaching" in ordering an indictment dismissed based upon the court's "supervisory

power of the administration of criminal justice." It was precisely the same type of "unfairness" remedied by the court in *Guido* which the panel deciding the instant case unfortunately ignored. Only by going behind the face of the indictment–to look beyond the mere number of violations charged–could that panel and this Court possibly realize the injustice these petitioners would suffer if forced to trial once again. As the policy underlying the Double Jeopardy Clause is to avoid such injustice, and as the opinion in this case appears inconsistent with the recognition of that principle in *Guido* and other recent Court of Appeals' decisions, petitioners respectfully submit that the granting of this petition for writ of certiorari would be in the interests of justice.

ARGUMENT

A. Further Prosecution Of Petitioners On The Remaining Counts Of The Indictment Would Violate The Double Jeopardy Provision Of The United States Constitution.

Petitioners recognize the validity of the principle relied upon by the appellate courts that, in order to support a claim of double jeopardy, the moving party must show that the offenses charged were in law and in fact the same offense. *Kowalski v. Parratt,* 533 F.2d 1071, 1074 (8th Cir.), *cert. denied,* 429 U.S. 844, 97 S. Ct. 125 (1976); see also *United States v. Westover,* 511 F.2d 1154, 1156 (9th Cir.), *cert. denied,* 422 U.S. 1009, 95 S. Ct. 2633 (1975); *Sanchez v. United States,* 341

F.2d 225, 227 (9th Cir.), *cert. denied,* 382 U.S. 856, 86 S. Ct. 109 (1965). The court failed to recognize, however, the equally valid principle that a conspiracy may not be subdivided arbitrarily in such a way as to result in multiple indictments on a single conspiratorial agreement. *United States v. Mallah, supra,* 503 F.2d at 985; *United States v. Palermo,* 410 F.2d 468, 470-471 (7th Cir. 1969); *United States v. Cohen,* 197 F.2d 26, 29 (3rd Cir. 1952); see also *United States v. Moore,* 522 F.2d 1068, 1078 (9th Cir. 1975), *cert. denied,* 423 U.S. 1049, 96 S. Ct. 775 (1976). Where it thus appears on the face of the indictment that but one agreement was involved, and hence but one conspiracy, "[t]he one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Braverman v. United States,* 317 U.S. 49, 53, 63 S. Ct. 99, 102 (1942); *accord, Launius v. United States,* 575 F.2d 770, 771 (9th Cir. 1978). In applying both of these well-established principles to the facts of the instant case, therefore, the critical question the court was faced with was whether the government treated the elements of the separate offenses as one over-all conspiracy, not simply whether on the face of the indictment four separate offenses were charged.

As previously indicated, the "same evidence" test, the traditional standard used to determine whether offenses are the same[3], has become open to serious question in

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[3]This test was restated by the Ninth Circuit in Arnold v. United States, 336 F.2d 347, 349 (1964), as follows:

narcotics conspiracy cases. Realizing the inadequacy of the "same evidence" test in determining whether one criminal conspiracy is the same as the second criminal conspiracy and the difficulties a defendant encounters when raising this issue, the Second Circuit in *United States v. Mallah, supra,* held that once a defendant introduces sufficient evidence that the two conspiracies alleged were in fact one, the burden shifts to the government to rebut the inference of unity.[4] (503 F.2d at 986.) The particular facts which compelled the *Mallah* court to reverse the conviction of appellant Pacelli warrant elaboration.

Pacelli was first convicted of conspiring with three named co-defendants and "others to the Grand Jury unknown" to traffic in narcotics from January 1, 1971 to June 14, 1971 (Pacelli I). All overt acts alleged took place in New York City in May, 1971. The proof indicated that Pacelli's co-defendants were underlings in a narcotics conspiracy but did not define the scope of the operation of which they were a part. Pacelli's second

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3 (cont'd)

> "Is proof of the matter set out in a second indictment admissible as evidence under the first indictment, and could a conviction have been properly sustained on such evidence? If the answer is yes, then the plea is sufficient; otherwise, it is not. [See citation omitted.]"

In applying this standard, however, courts must be mindful that this is not a standard of mathematical precision. In Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221 (1977), the Supreme Court recognized this limitation:

> "It has long been understood that separate statutory crimes need not be identical–either in constituent elements or in actual proof–in order to be the same within the meaning of the constitutional prohibition." (432 U.S. at 164, 97 S. Ct. at 2224.)

[4]Since the court concluded trhat the government failed to satisfy the stricter traditional test, the court did not reach the issue of whether a different standard should be applied. (503 F.2d at 985, n. 7.)

conviction (Pacelli VI)[5] also involved membership in a narcotics conspiracy, this time with sixteen named co-defendants and "others to the Grand Jury unknown." This conspiracy allegedly began the same date as that in Pacelli I and continued into 1973. Again all overt acts occurred in New York City. The proof in Pacelli VI established a large-scale conspiracy with Pacelli near the core and a large staff beneath him. The court noted the fact that the period of the first conspiracy was totally subsumed by the period of the second. Also, the location of the conspiracies was the same. These factors alone, however, were not sufficient indicia of a single conspiracy. As the *Mallah* court recognized, "New York City is large enough to harbor two simultaneous narcotics conspiracies . . . . " (503 F.2d at 983.)

In concluding that the two conspiracies were, in fact, one conspiracy, the court reasoned that the naming of only low-level foot soldiers and Pacelli, together with "others to the Grand Jury unknown," in Pacelli I, suggested that the others unknown were the named defendants in Pacelli VI. The Pacelli I conspiracy could not have operated without a larger organization backing it up. The suggestion that this larger organization was the Pacelli VI network was further buttressed by evidence that personnel in one conspiracy were acquainted with those in the other. (See discussion, 503 F.2d at 985-986.) Thus, the court found it unclear whether there was any difference between the two conspiracies with respect to such key factors as the

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[5]The cases are labeled as in the Mallah opinion. Pacelli's entanglement with the law unrelated to the double jeopardy issue accounts for the intervening numbers.

principals, the source of their drugs, the means and places of importation, their distribution points, and the center from which they operated. Concluding that the government had not rebutted the presumption that the two conspiracies of which Pacelli had been convicted were in fact one conspiracy, the court reversed his conviction. (*Id.*)

In *United States v. Cooper, supra,* the court also recognized the inadequacy of the "same evidence" test and adopted a different test. The standard which the court deemed appropriate was stated as follows:

> " . . . whether or not the totality of the circumstances demonstrate an identity of purpose and commonality of personnel, of time, of locale and of method of operation sufficient to permit the court to conclude that the agreements are in fact the same." (442 F. Supp. at 1263, footnote omitted.)

The facts of the *Cooper* case also warrant further discussion.

Appellants, Ernesto and Juan Tercero, and numerous others were charged in the District of Minnesota with conspiracy to import marijuana into the United States. The conspiracy charged was alleged to have commenced on an unknown date in 1974 and to have continued thereafter until September, 1975. The conspiratorial acts were alleged to have taken place in "Minnesota, Arizona and elsewhere." Count two charged a conspiracy to distribute marijuana. In form, it was otherwise identical to count one. Approximately one year later, appellants and others were charged in the District of Arizona with conspiracy to import marijuana into the United States. This conspiracy was alleged

to have existed from March 1, 1975 to May 13, 1975. The conspiratorial acts were alleged to have taken place in "Arizona and elsewhere." Count two charged a conspiracy to distribute marijuana; it was otherwise identical to count one. Appellants went to trial on the Arizona charges first and the District Court entered a judgment of acquittal. When brought to trial on the Minnesota charges, appellants maintained that the conspiracies charged in Arizona and those charged in Minnesota were in reality a single conspiracy, and that they were thus entitled to the protection of the Double Jeopardy Clause of the Fifth Amendment.

In accepting the defendants' argument that the evidence demonstrated only one over-all conspiracy to import marijuana from Mexico and to distribute it throughout the United States, the court placed particular emphasis on the overlaps in personnel, in time and in locale.

> "The dates, the locations, the personnel and the method of operation involved in the conspiracies charged in the Arizona and Minnesota indictments overlap to such an extent that the court can do nothing but conclude that the two operations are no more than different faces of a single conspiracy." (442 F. Supp. at 1263.)

The court thereafter discussed each of these factors more fully and concluded its reasoning with particularly appropriate language to the case at bar.

> "Thus, it is clear that the unlawful purpose of the various conspiracies charged was the same and that the principal actors were unchanged. It is equally clear that there were other persons

> who played minor roles and who did not know the scope of the over-all conspiracy; many of those persons did not remain members of the conspiracy for its entire duration. *However, the addition of new members to a conspiracy or the withdrawal of old ones does not fragment the conspiracy into numerous separate and unrelated conspiracies.* [See citation omitted.] It is also clear that the times during which the conspiracies continued and the locales in which they operated were substantially the same. [See citation omitted.]
>
> "Therefore, the court is satisfied that Ernesto and Juan Tercero have met the test which the court determines to be appropriate. The totality of circumstances demonstrate an identity of purpose and a commonality of personnel, of time, of locale and method of operation. Based upon that showing, the court concludes that the agreements are the same and that Ernesto and Juan Tercero may not be tried again for the same offense." (Emphasis added.) (442 F. Supp. at 1265-1266.)

Another relevant case in this area was recently decided by the Fifth Circuit in *United States v. Ruigomez, supra.* In that case, Ruigomez was indicted for several violations of federal narcotics laws, including one charge of conspiracy to possess marijuana with intent to distribute. Following his trial and acquittal on these charges, the government secured a second indictment against him on an identical conspiracy count, supported by facts similar to those alleged in the previous indictment, and on an additional count of conspiring to distribute marijuana. At his second trial, Ruigomez

was convicted on the former count, and he appealed that conviction as the product of double jeopardy, claiming that the government impermissibly carved two conspiracies out of one.

In contending that the conspiracies were separate and distinct, the government argued that different overt acts were alleged in each indictment, thereby requiring the question to be resolved by use of the "same evidence" test. The court, however, declined to apply this test, ruling, as did the *Mallah* and *Cooper* courts, that using such a test permits the government arbitrarily to split unitary narcotics conspiracies and to initiate many prosecutions. (576 F.2d at 1151.) The court, rather, found the relevant question to be whether the particular transactions alleged in the indictment were within a larger, unified conspiracy. Finding that the evidence supported a single, continuing conspiracy to purchase and distribute marijuana, the court reversed Ruigomez's conviction as being the product of an unconstitutional imposition of double jeopardy.

In the case at bar, the factual situation warranting application of double jeopardy guarantees is even stronger than the *Mallah, Cooper* and *Ruigomez* cases. For here, the government alleged that exactly the same evidence proved both the charges involving importation and the charges involving distribution. The participants in each set of charges were alleged to be the same, as were the time periods, locations, and method of operation. These factors would satisfy the usual test for determining the existence of a unified conspiracy, but especially so under the newer test. Thus, by alleging identical overt acts in furtherance of both conspiracies, the government was, in fact, saying that there

was only a single, over-all conspiracy. Indeed, government counsel relied on this very argument when it became crystal clear that the evidence did not support certain defendants' participation in the charged conspiracy to import.

The most recent and relevant of all cases, however, is *United States v. Guido, supra,* where a different panel of the Ninth Circuit was faced with almost identical arguments as those propounded by the current petitioners. In that case, the defendants were first indicted in the Eastern District of California with a conspiracy to import marijuana from April 29, 1977 through May 12, 1977. A second indictment was thereafter filed in the District of Arizona charging a conspiracy to import and possess marijuana with intent to distribute from March 1, 1976 through November 15, 1976. Although the Arizona indictment was returned second, it covered a period prior to the period covered by the earlier California indictment.

The facts adduced under the Arizona indictment established that in February or March of 1976, in Phoenix, Arizona, one Doyle Rowland approached an acquaintance, Gordon House, and requested that he act as a pilot to fly marijuana from Mexico into the United States for the defendant Guido. Guido explained to House that he had contacts in Portland, Oregon, who would distribute the marijuana if House would fly it. In either April, May or July of 1976, these three met again with defendant Doyle and an associate and planned their first smuggling transaction. As planned, House flew to Mexico, where he procured marijuana on credit from Memo, a Mexican supplier whom House knew from prior drug smuggling flights and

had suggested. House then flew the marijuana to an abandoned airstrip near Phoenix, where he was met by Doyle and his associate, who transferred the marijuana from the plane to a camper truck which was driven by Doyle and his associate to Portland. House, after returning the plane to Phoenix, rode with Guido and Rowland to Portland, where the marijuana was distributed. Later, House, Guido and Rowland returned to Mexico to pay Memo.

A second, comparable transaction was executed in August or September of 1976. Thereafter, House withdrew from the conspiracy, and the conspirators hired another pilot–known only as "John"–to transport the marijuana into Arizona from Mexico. John flew three or four flights for Guido, Rowland and Doyle and smuggled about 4,000 pounds of marijuana into the United States. He, too, obtained the marijuana from Memo and distributed it through Doyle. Because of monetary problems, John withdrew from the conspiracy after his last flight at the end of October or the beginning of November of 1976. At that time or shortly thereafter, Rowland also withdrew from the conspiracy but remained friendly, in particular with Guido, and was apprised by the conspirators of their continuing smuggling operation.

The facts underlying the California indictment revealed that at about the time that Rowland withdrew from the conspiracy, in late November or early December of 1976, an informant for the DEA was approached by a Charles Emerett, who at the time was seeking a pilot to fly plane loads of marijuana into the United States. When the informant next sought Emerett, in March of 1977, he renewed his desire to

find the pilot. Thereafter, the informant introduced Emerett to James Plaven, an undercover DEA agent posing as a pilot. Emerett advised Plaven that he was associated with two other people from Phoenix (subsequently determined to be Guido and Doyle) and could arrange for marijuana to be available in Mexico. Emerett told Plaven that he sought to hire him as a replacement for a pilot with whom there had been disagreements over money. Plaven subsequently met with Guido and Doyle in San Diego and learned that marijuana would be procured from Mexico and then flown to an abandoned airstrip north of Phoenix where Doyle and another person would meet him with a camper truck. Guido told Plaven that he had made two previous pilots rich in approximately eleven trips and that if the first trip was successful, the venture would continue with Plaven making weekly flights. As a result of these conversations, Plaven, along with another undercover agent, flew to Phoenix, Arizona, to meet with the defendants. Soon after the meeting, Guido and Doyle were arrested.[6]

As noted above, the defendants were thereafter indicted in the Eastern District of California and charged with a conspiracy from on or about April 29, 1977, up to and including May 12, 1977, to import marijuana into California and elsewhere in violation of 21 U.S.C. § 963. A month later, the

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[6]In all of the cited cases, including Guido, the courts have gone to great length in explaining the facts of each particular segment or transaction in great detail. This is because the way each segment or transaction related to one another was usually the determining factor in whether double jeopardy applied. It is for this reason in particular that petitioners feel it is essential that the Court have before it the entire record, to see exactly what evidence was introduced in support of the charges and, more importantly, the manner in which such evidence was offered by government counsel.

Assistant United States Attorney who was prosecuting the defendants in California sent a copy of that indictment to the Assistant United States Attorney in Arizona[7], identifying at the same time the attorneys representing the defendants in California. In December of 1977, and January of 1978, Guido and Doyle entered pleas of guilty to the charge in California and were sentenced to terms of eighteen months and three months, respectively.

It was not until May of 1978 that the defendants were indicted in Arizona and charged with a conspiracy from on or about March 1, 1976 until on or about November 15, 1976, in the District of Arizona and elsewhere, (in Count I) to import marijuana in violation of 21 U.S.C. § 963 and (in Count II) to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846. When the defendants moved to dismiss the indictment on double jeopardy and due process grounds, the government countermoved to dismiss Count I of the indictment. The District Court granted the government's motion but denied the defendants' motion to dismiss after a pretrial hearing and also after trial. Guido and Doyle were tried without a jury and convicted of Count II. Guido was sentenced to a term of five months, a special parole term of four years, and a fine of $1,000. Doyle was sentenced to a term of three years.

Before the District Court, the defendants argued that the conspiracy charged in Arizona was the same conspiracy

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[7]Prior to the California indictment, House was interviewed by DEA agents in Tucson concerning, among other things, his involvement with Guido and Doyle. At that time, he gave a 40-page statement which implicated, among others, Guido and Doyle in drug smuggling. Shortly thereafter, House appeared before the grand jury in the District of Arizona and testified as to his criminal association with Guido and Doyle from March of 1976 through September of 1976.

to which they had pled guilty in the Eastern District of California and that, accordingly, the indictment should be dismissed. The District Court found otherwise, stating that there were two separate crimes arising out of two separate conspiracies at different times, with different participants, and with different purposes. In concluding otherwise, the appellate court explained its reasoning in particularly appropriate language to the situation presented in the present case:

> "It is clear, however, that Guido and Doyle were the key participants in the agreements alleged in both indictments. From the inception of the conspiracy in March 1976, Doyle was Guido's contact in Oregon. Thereafter, Guido and Doyle continued as masterminds and as the operational core of an on-going conspiracy, to act together to distribute smuggled marijuana. The conspiracy was not, therefore, terminated by the mere change in pilots nor by the withdrawal of Rowland and the apparent enlistment of Emerett. [See citations omitted.]
>
> "Nor is the period of time between the alleged termination of the Arizona conspiracy on November 15, 1976, and the alleged beginning of the California conspiracy on April 2, 1977, persuasive. See *Braverman v. United States,* 317 U.S. 49, 52, 63 S. Ct. 99, 101, 87 L. Ed. 23 (1942). Contrary to the government's contentions, a lapse and/or termination of the conspiracies cannot be inferred simply from an apparent lull in drug deliveries. Emerett sought a replacement pilot first in November

or December 1976 and then again in April 1977. With the assistance of a government informant, he enlisted Agent Plaven. Thus, there was but one on-going conspiracy that, as Plaven was told when he was recruited to replace a previous pilot, had been successful in using the proposed method of importation and distribution.

"*Nor did the purposes of the alleged conspiracies differ. The California indictment charged Guido and Doyle merely with conspiracy to import marijuana but the parties clearly conspired as well to distribute any marijuana successfully smuggled by Plaven. The Arizona indictment charged both conspiracy to possess with intent to distribute and conspiracy to import marijuana. The government's deliberate dismissal of the importation count after defendants moved to dismiss the indictment cannot change the fact that the purpose of the alleged Arizona conspiracy was to import as well as to distribute marijuana.*

"To summarize, the conspiracies alleged in both indictments involved the same objectives (to import and distribute large quantities of marijuana), the same key participants (Guido and Doyle), the same source (Memo, who apparently fits the description given Plaven of the Mexican supplier in Santa Ana), the same means (a small private plane and camper truck), the same place of importation (Arizona airstrips), the same distribution points (Portland), and one period of time (1976-1977). Thus, it is hard to escape the conclusion

> that the conspiracies alleged in the California and Arizona indictments were in fact a single continuing conspiracy. *United States v. Mallah,* 503 F.2d 971 (2nd Cir. 1974), *cert. den.*, 420 U.S. 995, 95 S. Ct. 1425, 43 L. Ed. 2d 671 (1975); *United States v. Tercero,* 580 F.2d 312 (8th Cir. 1978)." (Emphasis added.)

The court also concluded that it had a responsibility under its supervisory power of the administration of criminal justice to correct the unfairness of fragmentary prosecution. The court was of the opinion that the Arizona prosecutor had sufficient notice to realize that the indictment he was about to file covered only a different period arising out of the same single conspiracy for which the defendants had theretofore pled guilty in California. In order to maintain the integrity of the judicial process, therefore, the court exercised its supervisory authority "to avoid and reverse the unjust result arising from two prosecutions from the same offense."

The situation presented in the *Guido* case and that in the case at bar is strikingly similar. In both cases, the period covered by the single conspiracy could easily be divided into two successive periods, but still involving the same objectives, same key participants, same means, same method of operation, and same distribution point. And, in both cases, counsel for the government ignored these factors and deliberately bifurcated the single continuing conspiracy into two conspiracy charges. While petitioners believe their double jeopardy claims should prevail, it is submitted that this Court must exercise its supervisory authority, as did the *Guido* court, to condemn

government counsel for the attempted fragmentary prosecution and to correct the inherent unfairness of the present situation.

In summary, the appellate court's opinion only scratches the surface of what occurred in this case. This is evidenced by the court's reliance on *United States v. Marotta,* 518 F.2d 681 (9th Cir. 1975)[8], which, unlike *Guido,* is distinguishable from the instant case. Petitioners have never contended that had there been independent evidence showing they had violated both sets of statutes there would have been no question of the trial court's authority to have sentenced petitioners to consecutive terms on each violation. However, as indicated time and time again, the government did not present independent evidence of two separate conspiracies, but of only a single conspiracy to import and distribute cocaine.

It is thus respectfully submitted that whether applying the "same evidence" test or the more liberal test formulated by the *Cooper* court, it is clear that the government split up a single conspiracy into two separate conspiracies for the purpose of prosecution. This is convincingly demonstrated by the manner in which the case was pled and argued at the time of trial. As was recently stated by this Court in *Sanbria v. United States,* ..... U.S. ..... , 98 S. Ct. 2170, 2179 (1978):

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[8] In Marotta, supra, the appellant was convicted of conspiracy to possess with intent to distribute marijuana and conspiracy to import the same marijuana. He was thereafter sentenced to consecutive prison terms on each count. One of the errors urged on appeal was that it was not permissible to convict him on two counts of conspiracy when in fact only one conspiracy existed. In rejecting this contention, the court distinguished the Braverman case on the ground that the evidence showed that the appellant had violated both statutes independently, even though the violations came about by participation in a single chain of events. The court therefore held that though the appellant had been engaged in a single conspiracy, such conspiracy still had dual criminal objects that could be punished twice as severely as a conspiracy which embraced only one criminal object. (See discussion, 518 F.2d at 684-685.)

> "The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, 'in case any of the proceedings are taken against [the defendant] for a similar offense, . . . the record [will] show with accuracy to what extent he may plead a formal acquittal or conviction.' [See citations omitted.]" (Footnote omitted.)

The manner in which the superseding indictment was drawn in the instant case and the manner in which government counsel argued the case at the time of trial requires this Court to correct the injustice which would be caused by further prosecution of the petitioners.

B. The Deliberate Overreaching Practiced By The Government Bars Further Prosecution Of Petitioners.

One of the pre-trial motions filed by petitioners in this case was a Motion for Severance. At the hearing on this motion, all counsel argued that the government's own reports clearly indicated that none of the petitioners was involved in the conspiracy to import. It was submitted, therefore, that a single trial involving both conspiracy charges would severely prejudice each petitioner's chance to receive a fair trial. This would be so in that the "deluge of evidence" which would be presented concerning the importation charge would "carry over" to the distribution charge and create the very real danger of guilt by association. The granting of the various motions for severance, therefore, was the only way to safeguard a defendant's right to be

judged only on his own acts, not upon those of his co-defendants.

In response to these arguments, government counsel contended that both conspiracies arose out of the same series of acts and transactions. Therefore, whether the indictment charged one conspiracy or several was a question properly handled by the jury, since that determination was a question of fact as to the nature of the agreement. This being so, the argument went, permitted the government to attempt to prove its allegations by presenting all possible evidence to support a conviction and then shifting the burden to the jury to choose whether the evidence supported a finding of one conspiracy, multiple conspiracies, or no conspiracy at all. As such, severance was not required in this case because the government expected the evidence to prove that each defendant participated in one of the conspiracies at some point in time and was thus responsible for all the acts committed by any co-conspirator in furtherance of either charged conspiracy.

As previously indicated, the jury's verdict bore out petitioners' contention that the government simply possessed no evidence to support petitioners' involvement in the charged conspiracy to import, by acquitting petitioners of counts one and two.

In the recent decision of *Burks v. United States*, ... U.S. ....., 98 S. Ct. 2141, 2147 (1978), the Supreme Court stated:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence

> which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since 'the constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' [See citations omitted.]" (Footnote omitted.)

In a footnote to that opinion, the Court stated at page 2147, n. 6, that:

> "[W]e recognize that under the terms of the remand in this case the District Court might well conclude after 'a balancing of the equities,' that a second trial should not be held. Nonetheless, *where the Double Jeopardy Clause is applicable, its sweep is absolute.* There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination."

The reason to attach jeopardy at the impaneling of the jury, according to *Downum v. United States,* 372 U.S. 734, 736, 83 S. Ct. 1033 (1963), is that to permit the trial to be aborted might lead to mistrials covertly for the benefit of a prosecution that needs strengthening. A mistrial can operate as a "post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Illinois v. Somerville,* 410 U.S. 458, 467, 93 S. Ct. 1066 (1973). Thus, this Court, in *United States v. Dinitz,*

424 U.S. 600, 96 S. Ct. 1075 (1976), distinguished between mistrials caused by judicial or prosecutorial error and those caused by judicial or prosecutorial "overreaching." That Court held:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judges or prosecutors,' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. [See citations omitted.]" (424 U.S. at 611, 96 S. Ct. at 1081.)

Thus, where "prosecutorial overreaching" is found present, the interest protected by the Double Jeopardy Clause outweighs the public interest in conducting a second trial. As stated in *United States v. Kessler,* 530 F.2d 1246, 1256 (5th Cir. 1976):

> "This safeguard against 'prosecutorial overreaching' provided defendants by the Fifth Amendment Double Jeopardy Clause constitutes the 'inestimable safeguard against the . . . overzealous prosecutor' provided by a jury trial." (Footnotes omitted.)

While the mistrial in the instant case was declared because of the inability of the jury to reach a verdict on all counts, it is submitted that the above-principle

applies equally to this case. The inquiry, therefore, must center upon the prosecutor's conduct prior to and during the trial in order to determine if there was "prosecutorial overreaching." Although mere negligence by the prosecutors is not the type of overreaching contemplated by *Dinitz,* if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then "prosecutorial overreaching" will be found and a second prosecution barred. *Lee v. United States,* ..... U.S. ..... , 97 S. Ct. 2141, 2147 (1977); see also *United States v. Martin,* 561 F.2d 135, 139 (8th Cir. 1977); *United States v. DiSilvio,* 520 F.2d 247, 249-250 (3rd Cir.), *cert. denied,* 423 U.S. 1015, 96 S. Ct. 447 (1975).

As previously indicated, the facts in the case at bar clearly show that government counsel knew that at most only one conspiracy existed, rather than the two charged. This is again convincingly demonstrated by the manner in which the case was pled and argued at pre-trial and at the time of trial. Why government counsel chose to ignore what his own evidence plainly showed is not known. What is known, however, is that the multiple charging ultimately resulted in confusing the jury, making the jurors unable to reach a verdict, and assuring the prosecution of a "second shot" to convict the petitioners. This position is further buttressed by the fact that the prosecution intends to call additional witnesses at the retrial. Thus, the strategy effectively allowed the prosecution to manipulate the case in order to gain an opportunity to strengthen its case. Such a tactic clearly constitutes the type of "prosecutorial overreaching" which prohibits a second prosecution.

In *United States v. Kessler, supra,* the government was also guilty of deliberately presenting clearly inadmissible evidence which resulted in the defendant's seeking and the court granting a mistrial. The evidence in that case consisted of hearsay declarations of an absent alleged co-conspirator and, on the foundation laid by these hearsay declarations, an AR-180 automatic rifle which was allegedly "an example" of the arms involved in the conspiracy. As to the hearsay declarations, the court first ruled that they were not made in furtherance of the conspiracy charged and then stated:

> "The government, of course, knew before trial that Fernandez [the alleged co-conspirator] had diverted from any purposes of the alleged conspiracy. Nevertheless, the prosecution decided to present Agent Cortina who would voice these hearsay declarations and set the stage for the remainder of the drama. Cortina's testimony gives the distinct impression that Fernandez was a key figure who initiated the whole chain of succeeding events. It must have given the jury the same impression. The government chose this trial strategy despite the fact that it knew that Fernandez (for some unexplained reason) refused to come to the United States and appear as a witness, thus depriving the defendants of any opportunity to test Fernandez by cross-examination and to have the jury weigh his credibility." (530 F.2d at 1257, footnote omitted.)

As to the rifle, the court thereafter commented:

> "Next we come to the AR-180 rifle (Government Exhibit No. 3). The AR-180 was admitted

> in evidence on the basis of the foundation laid by the inadmissible hearsay declarations of Fernandez that it was 'an example' of the arms involved in the alleged conspiracy. Because Fernandez was not acting in furtherance of the alleged conspiracy at the time when he made this statement to Cortina, the AR-180 was inadmissible—it lacked a proper foundation. Moreover, the government knew in advance of trial that the AR-180 was not only inadmissible, but that it was false evidence." (*Ibid.*)

Based on this conduct, the court concluded:

> " . . . that there was intentional misconduct by the government regarding the AR-180, a known false exhibit, which caused serious prejudice to the defendants' rights to a fair jury trial. Such intentional misconduct is 'prosecutorial overreaching' and is one of the 'type[s] of oppressive practices at which the double-jeopardy prohibition is aimed.' *Wade v. Hunter,* 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949). The defendants reasonably concluded that a continuation of the tainted proceeding would result in a conviction, and thus were forced to move for a mistrial. (Footnotes omitted.)
>
> "The instant case demonstrates the wisdom of the Double Jeopardy Clause. The defendants have shown the presence of anxiety, embarrassment, expense, and delay. * * * We agree with the District Court 'that the defendants have been

> prejudiced.' We conclude that a new trial in the present case would amount to harassment and would merely afford the prosecution another opportunity to convict. Thus, the public interest in fair trials ending in just judgments would not be advanced but would be subverted by a new trial in this case." (*Id.* at 1257-1258.)

A similar result was reached by the Eighth Circuit in *United States v. Martin, supra.* In that case, the defendant moved prior to trial to prohibit the government's attorney from reading defendant's grand jury testimony to the jury as substantive evidence, arguing that most of the statements were irrelevant and prejudicial. The government's attorney, however, assured the court that the irrelevant statements contained in the grand jury testimony had been excluded. The District Court denied the defendant's request, but cautioned the government that use of the testimony must not violate any of the court's prior rulings. In addition, the court indicated that the defendant's objection to the use of the grand jury testimony would be treated as a continuing objection.

Early in the trial, after two witnesses had testified for the government, the government's attorney read a substantial portion of the defendant's grand jury testimony to the jury. As a result, the defendant moved for a mistrial, which the District Court granted. The defendant thereafter filed a motion to dismiss the indictment, contending, in part, that the Double Jeopardy Clause barred a second trial because of the government's attorney's conduct in reading the highly prejudicial material

to the jury.

The court, in agreeing with the defendant's contention that the prosecutor's conduct constituted gross negligence, characterized the conduct as follows:

> "It is readily apparent that improper and prejudicial remarks made by grand jurors were read to the trial jury. In addition improper and prejudicial remarks made by the prosecutor were read to the jury. The record is replete with instances where the defendant was interrupted in his answers or was not given an opportunity to answer. In addition, at one point the prosecutor in effect testified by answering a question posed by a grand juror. If the government's actions in reading this irrelevant and highly prejudicial testimony to the jury were not intentionally designed to provoke a mistrial request, at a minimum they constitute gross negligence. It can best be described as prosecutorial error undertaken to harass or prejudice the defendant–prosecutorial overreaching." (561 F.2d at 140, footnote omitted.)

The court, accordingly, held that the defendant's constitutional right not to be twice put in jeopardy had been violated, and ordered the indictment to be dismissed.

The actions of government counsel in the instant case similarly require dismissal of the indictment due to "prosecutorial overreaching." Knowing that the evidence on counts one and two was very weak, the government intentionally charged two conspiracies and continually opposed petitioners' Motion to Sever, so that at a joint

trial the evidence concerning counts three and four could be relied upon to convince the jury of petitioners' guilt on counts one and two. Such a tactic must clearly not be condoned by this Court.

Based, then, on the hardships which will be caused petitioners by a second prosecution, it is respectfully submitted that petitioners' retrial is barred by the Double Jeopardy Clause of the Fifth Amendment because of "prosecutorial overreaching."

CONCLUSION

For the above-mentioned reasons, petitioners GARY TOUGHILL, MARGUERITE COSTANZA and SAUNDRA NAVARRO request that this Honorable Court grant the instant petition for writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

STATUTES INVOLVED

Title 21, U.S.C.

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

. . .

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§ 952. Importation of controlled substances—Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule

I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, . . .

§ 960. Prohibited acts A—Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

†

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROGER LEE BURKETT, SAUNDRA NAVARRO, MARGUERITE CONSTANZA, and GARY TOUGHILL, Defendants-Appellants.

Nos. 79-1122
79-1233
79-1348
79-1349

[Filed December 3, 1979]

Appeal from the United States District Court for the Southern District of California

Before: ELY and WRIGHT, Circuit Judges, and HOFFMAN*, District Judge.

HOFFMAN, District Judge:

This interlocutory appeal from the United States District Court for the Southern District of California is based upon the denial of appellants' motions to dismiss the indictment because of alleged double jeopardy. Jurisdiction is established by 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651 (1977).

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*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The district court determined that this interlocutory appeal concerns strictly legal issues that could be decided without reviewing a transcript of the trial. We agree that only questions of law are raised by this appeal, and find that those questions have been clearly presented in the parties' briefs. Accordingly, it is not necessary that we review a transcript of the proceedings.[1]

On October 6, 1978, the Grand Jury returned a superseding indictment charging the appellants and five other persons with conspiracy to illegally import a controlled substance, in violation of 21 U.S.C. § 963 (count one); illegal importation of a controlled substance, in violation of 21 U.S.C. §§ 952, 960 and 963 (count two); conspiracy to dispense and distribute a controlled substance, in violation of 21 U.S.C. § 846 (count three); and possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Appellants' trial began on December 5, 1978, and was concluded on December 22, 1978. Appellant Gary Toughill was found not guilty of illegal importation of cocaine; however, the jury could not reach a verdict as to conspiracy to illegally import cocaine, conspiracy to dispense and distribute cocaine and possession of cocaine with intent to distribute. Appellants Marguerite Costanza, Roger Lee Burkett and Saundra Navarro were acquitted on both importation counts, but the jury was unable to reach a verdict as to conspiracy to dispense and distribute cocaine and posses-

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[1]It should be noted, however, that a 2467 page transcript of the motions and trial of this case is now before this court in the appeal of co-defendant Robert Eugene Preston, Case No. 79-1080, an appeal heard by the same panel.

sion with intent to distribute cocaine. The court declared a mistrial as to the counts upon which the jury could not reach a verdict. Appellants' subsequent motions to dismiss the remaining counts of the indictment on the ground that retrial on those counts violates the double jeopardy clause of the Fifth Amendment were denied by the district judge after a hearing on February 5, 1979.

Specifically, the appellants make the following contentions: that the acquittal of appellants on counts one and two of the indictment bars further prosecution on counts three and four under the double jeopardy provisions of the United States Constitution; that the acquittal of appellant Toughill on count two only similarly bars further prosecution on counts three and four under the double jeopardy provision of the United States Constitution; and, that deliberate overreaching by the government bars further prosecution of all appellants. For the reasons stated below, we affirm the decision of the district court.

This Court has for a long time recognized that a mistrial after a jury has been unable to reach a verdict is no bar to a subsequent retrial on the same charges; it is an exception to the general rule that jeopardy attaches upon the swearing-in of the first juror. *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *United States v. See*, 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *Oelke v. United States*, 389 F.2d 668 (9th Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Appellants claim that in this case one large conspiracy was arbitrarily broken down into two conspiracy counts, and that acquittal on the first conspiracy count acts as a bar to any further prosecution on the second conspiracy count. They argue

that because the same set of facts was presented to prove either conspiracy, a retrial on the possession and distribution counts should be barred by the acquittal on the importation counts. Appellants have cited several cases dealing with double jeopardy claims to support these contentions, including *Braverman v. United States,* 317 U.S. 49 (1942); *United States v. Guido,* 597 F.2d 194 (9th Cir. 1979); *United States v. Ruigomez,* 576 F.2d 1149 (5th Cir. 1978); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975); and *United States v. Cooper,* 442 F. Supp. 1259 (D. Minn. 1978).

In order to support a claim of double jeopardy, appellants must show that the offenses charged were in law and in fact the same offense. See *Kowalski v. Parratt,* 533 F.2d 1071, 1074 (8th Cir.), *cert. denied,* 429 U.S. 844 (1976); *see also United States v. Westover,* 511 F.2d 1154, 1156 (9th Cir.), *cert. denied,* 422 U.S. 1009 (1975); *Sanchez v. United States,* 341 F.2d 225, 227 (9th Cir.), *cert. denied,* 382 U.S. 856 (1965). In this case the appellants were charged with four separate offenses as defined by four distinct federal criminal statutes.[2] Therefore, an acquittal

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[2] 21 U.S.C. § 963: "Any person who attempts or conspires to commit any offense defined in this subchapter [Subchapter II-Import and Export] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." (Count 1).

21 U.S.C. § 952(a): "It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug . . . . " (Count 2).

21 U.S.C. § 846: "Any person who attempts or conspires to commit any offense defined in this subchapter [Subchapter I-Control and Enforcement] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." (Count 3).

on the importation charges is not a bar to a retrial on the charges of conspiracy to possess and distribute and the substantive offense of possession with intent to distribute.

This is not a case where the government has indicted on several counts based on multiple occurrences of the same statutory violation. *Cf. Braverman v. United States,* 317 U.S. 49 (1942); *United States v. Ruigomez,* 576 F.2d 1149 (5th Cir. 1978); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975); *United States v. Palermo,* 410 F.2d 468 (7th Cir. 1969); *United States v. Cooper,* 442 F. Supp. 1259 (D. Minn. 1978). Here we are dealing with separate offenses requiring the proof of distinct, individual elements.

We determined in *United States v. Marotta,* 518 F.2d 681, 684 (9th Cir. 1975), that when dealing with 21 U.S.C. § 846 (conspiracy to possess with intent to distribute) and 21 U.S.C. § 963 (conspiracy to import), "the Congressional intent is unmistakable in that there are two separate and distinct offenses defined." In *Marotta,* the defendant's convictions under both statutes were affirmed with the understanding that he "was engaged in a single conspiracy with dual criminal objects . . . " 518 F.2d at 685. In addition, the court determined that imposing consecutive sentences for each of the violations did not offend the double jeopardy clause. *Accord, United States v. Garner,* 574 F.2d 1141 (4th Cir. 1978); *United States v. Houltin,* 525 F.2d 943 (5th Cir.), *vacated on other grounds, sub nom., Croucher v. United States,* 429 U.S. 1034 (1976). *But see*

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2 (cont'd)
21 U.S.C. § 841(a): "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . . " (Count 4).

United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *United States v. Adcock,* 487 F.2d 637 (6th Cir. 1973).

Appellants have relied heavily upon the recent case of *United States v. Guido,* 597 F.2d 194 (9th Cir. 1979). Although *Guido* is distinguishable from this case, it should be examined closely. Two defendants were charged in an indictment returned on May 17, 1977, in the Eastern District of California, with conspiracy to import marijuana from April 29, 1977 through May 12, 1977. Both defendants pled guilty to these charges. On May 2, 1978, another indictment was returned in the District of Arizona charging the defendants with conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute from March 1, 1976 through November 15, 1976. The defendants moved to dismiss the second indictment on double jeopardy and due process grounds, arguing that the conspiracy charged in Arizona was the same conspiracy to which they pled guilty in the Eastern District of California. The government responded by moving to dismiss the conspiracy to import count. The Arizona district court granted the government's motion and denied defendants' motion. The defendants were tried and convicted. On appeal, this Court concluded that the conspiracies alleged in the California and Arizona indictments were in fact one continuing conspiracy; accordingly, the convictions were reversed.

In *Guido,* the Arizona prosecutor had received a copy of the California indictment and was aware of the facts surrounding the conspiracy prior to filing the Arizona indictment. This "should have been sufficient notice to

the Arizona prosecutor that the indictment he was about to file covered only a different period arising out of the same single conspiracy for which the defendants had theretofore pled guilty in California." *Guido,* 597 F.2d at 199. This Court, without ruling on the double jeopardy and due process claims, held that under its supervisory power of administration of criminal justice it had the authority "to correct such unfairness."

Appellants have presented a fundamentally different situation. They are being retried on counts for which the jury was unable to reach a verdict. Those counts charge the appellants with crimes separate and distinct from those for which they were acquitted. Although *Guido* appears to be on point in that it involved two distinct crimes (the California indictment charged defendants with conspiracy to import marijuana while the Arizona indictment charged conspiracy to possess and distribute marijuana), the Court found that, practically speaking, there was no difference between the allegedly separate conspiracies; the purpose of each was to import as well as possess and distribute marijuana. Here, there has been no arbitrary temperal division of a single conspiracy by an overeager prosecutor in order to facilitate multiple prosecutions. Appellants' acquittals on the importation charges were unrelated to their retrial on the possession and distribution charges. In short, this case lacks the inherent "unfairness" that prompted the court to reverse the convictions in *Guido.*

Appellant Toughill argues that his acquittal on the substantive importation count (count two) necessarily indicates a finding that he did not have the *intent* to import a controlled substance. He argues further that such

intent is an essential element of the remaining three counts, and that its absence requires a dismissal of those counts. Toughill's argument ignores the possibility that his acquittal on the substantive importation charge may have been the result of any of a number of factors, and not solely a jury finding of lack of criminal intent. In any event, intent to import a controlled substance is not an element of conspiracy to possess and distribute a controlled substance. For those reasons, Appellant Toughill's arguments must fail.

There is also no merit to appellants' contention that deliberate overreaching by the government prosecutor should bar retrial. Charging four separate offenses in violation of four separate and distinct criminal statutes cannot be termed prosecutorial overreaching. Nor does this appear to be a case where the prosecution covertly sought a mistrial for an opportunity to strengthen its case. *Cf. Downum v. United States,* 372 U.S. 734, 736 (1963).

AFFIRMED.

†

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH 10, 1980, I served the within PETITION FOR WRIT OF CERTIORARI (TOUGHILL, COSTANZA and NAVARRO v. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE
UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530
(3 copies)

U. S. ATTORNEY
Southern District of California
940 Front Street
San Diego, California 92189
(3 copies)

DISTRICT COURT
Southern District of California
940 Front Street
San Diego, California 92189
(1 copy)
Ref.: U. S. v. Burkett, Navarro, Costanza and Toughill

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 10, 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES TO U. S. SUPREME COURT, WASHINGTON, D. C. 20543
Check No. 1176 - Dean-Standefer Co. in teh amount of $100 – docket fee– attached to the original copy thereof.
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Supreme Court, U. S.
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No. 79-1400

In the Supreme Court of the United States

OCTOBER TERM, 1979

GARY TOUGHILL, MARGUERITE COSTANZA AND SAUNDRA NAVARRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

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GARY TOUGHILL, MARGUERITE COSTANZA AND SAUNDRA NAVARRO, PETITIONERS

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that under the Double Jeopardy Clause their retrial on certain counts of an indictment upon which the jury at their first trial could not reach a verdict is barred by their acquittal at that trial on other counts of the indictment. They also contend that retrial is barred by deliberate overreaching by the government at the first trial.

In a four count indictment filed in the United States District Court for the Southern District of California, petitioners and six others were charged with conspiracy to import cocaine (21 U.S.C. 963), conspiracy to distribute cocaine (21 U.S.C. 846), illegal importation of cocaine (21 U.S.C. 952), and possession of cocaine with intent to distribute it (21 U.S.C. 841(a)(1)). After a jury trial, all petitioners were acquitted on the substantive importation count and petitioners Costanza and Navarro were also acquitted on the importation conspiracy charge. The jury

was unable to reach a verdict as to the remaining counts, and the court declared a mistrial. The government declared its intention to retry petitioners on the remaining counts. Petitioners then filed motions to dismiss the indictment on double jeopardy grounds. The district court denied the motions, and the court of appeals affirmed (Pet. App. 3-10). The case was remanded to the district court, where retrial is set for May 28, 1980.

1. Petitioners contend (Pet. 8-27) that retrial on the counts charging conspiracy to distribute and possession with intent to distribute cocaine is barred by the Double Jeopardy Clause in view of their acquittals for importation and conspiracy to import cocaine. The court of appeals correctly rejected this contention because the offenses for which petitioners are to be retried are not the "same" as the offenses for which they were acquitted.

The Double Jeopardy Clause prohibits a second trial following an acquittal for the "same" offense. See *Burks* v. *United States*, 437 U.S. 1, 11, 16 (1978); *Sanabria* v. *United States*, 437 U.S. 54, 64 (1978); *United States* v. *Scott*, 437 U.S. 82, 91 (1978). The test for determining whether two statutory provisions define the same or different offenses was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). The test is satisfied "[i]f each [provision] requires a proof of a fact that the other does not * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Petitioners' contention can best be considered by treating separately the charges on which they are to be retried.

a. The *Blockburger* test is clearly met with respect to the count charging possession of cocaine with intent to distribute it. That offense requires proof of actual or constructive possession but does not require proof of actual importation (necessary to establish the substantive

importation charge) or of an agreement (necessary to establish conspiracy to import). Thus, a person can be guilty of possessing a controlled substance with intent to distribute it without having imported or conspired to import the controlled substance. See *United States* v. *Dubrofsky*, 581 F. 2d 208, 213 (9th Cir. 1978); *United States* v. *Garcia*, 589 F. 2d 249, 251 (5th Cir.), cert. denied, 442 U.S. 909 (1979). Accordingly, retrial on the possession count is plainly proper.[1]

b. Petitioners contend that the conspiracy to distribute cocaine and the conspiracy to import cocaine are in fact one and the same offense. They argue that a single conspiracy with two objects—to import and distribute cocaine—was arbitrarily split into two separate conspiracy counts, that the same overt acts were alleged to support each conspiracy count, and, therefore, that their acquittal of conspiracy to import bars their retrial for conspiracy to distribute.[2] This contention falls for two independent reasons.

First, as the court of appeals correctly held (Pet. App. 6-7), conspiracy to import a controlled substance, in violation of 21 U.S.C. 963, and conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846, are two separate and distinct offenses requiring proof of different elements. The fact that conspiracy, instead of substantive, offenses are involved is irrelevant for

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[1]In addition, we note that petitioners do not argue—nor could they—that their acquittal for importation and conspiracy to import created a collateral estoppel bar to their retrial for the offense of possession with intent to distribute. The jury's verdict on the importation-related charges did not determine that petitioners had not possessed cocaine with intent to distribute it. See *Sanabria* v. *United States*, *supra*, 437 U.S. at 73 n.31. To the contrary, the fact that the jury hung on the possession charge establishes that the jury did not determine the facts relating to that charge favorably to petitioners.

[2]This argument is unavailable to petitioner Toughill, who was not acquitted of conspiracy to import.

purposes of determining whether the offenses are the "same" within the meaning of the Double Jeopardy Clause. Assuming that there was only one "agreement" with two criminal objects, this case is indistinguishable from one in which a defendant is prosecuted separately for a single "act" or "transaction" that violates two substantive statutes with distinct elements. It is settled that reprosecution is permissible unless the second prosecution involves the "same offense" or relitigation of factual issues already resolved favorably to the defendant by the first. See *Brown* v. *Ohio*, 432 U.S. 161, 164-169 (1977); *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

This is not a case like *Braverman* v. *United States*, 317 U.S. 49 (1942), in which the government charged the defendant with several violations of a single general conspiracy statute based on one agreement to commit a number of different substantive offenses. In *Braverman*, the Court concluded that the offense defined by Congress in the general conspiracy statute was an agreement to commit one or several unlawful acts. This case, on the other hand, involves two specific conspiracy statutes, each of which proscribes an agreement to accomplish a different unlawful object. In such cases, separate conspiracy charges are proper. See *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (1946).[3]

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[3]Accordingly, the cases cited by petitioners (Pet. 10, 12, 13-18), involving successive prosecutions of two conspiracies charged under the same statutory provision and with the same unlawful objects, are inapposite.

We note that most courts that have considered the question have concluded that Congress intended violations of Sections 846 and 963 to be punished separately. See *United States* v. *Rodriguez*, 612 F. 2d 906 (5th Cir. 1980) (en banc); *United States* v. *Garner*, 574 F. 2d 1141, 1147 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Houltin*, 525 F. 2d 943, 951 (5th Cir. 1976), vacated on other grounds *sub nom. Croucher* v. *United States*, 429 U.S. 1034 (1977); *United States* v. *Marotta*, 518 F. 2d 681, 684-685 (9th Cir. 1975); but see *United States* v. *Honneus*, 508 F. 2d 566, 569 (1st Cir. 1974), cert.

Moreover, even if petitioners were correct that the indictment was multiplicitous, it would not follow that the acquittal on the importation conspiracy would bar retrial on the distribution conspiracy charge. Given the jury's failure to acquit petitioners of conspiracy to distribute cocaine, the jury's verdict reflects that there was a unanimous finding of insufficient evidence only on the importation aspect of the conspiracy, but that at least some jurors believed that there was sufficient evidence on the distribution aspect. Accordingly, if the conspiracy charges had been submitted to the jury in a single count, the jury would not have acquitted petitioners, but would have been unable to reach a verdict on that count, and petitioners would still be subject to retrial on that count.

Petitioners' reliance (Pet. 19-26) on *United States* v. *Guido*, 597 F. 2d 194 (9th Cir. 1979), is misplaced. In that case, the court, without reaching the defendants' double jeopardy claim, exercised its supervisory power to dismiss a conspiracy indictment brought by the government in one district following the defendants' entry of a guilty plea to a conspiracy charge in another district, where the two indictments involved the same objectives, the same key participants, the same source, means, locations and time frame. Whatever the merits of that decision, here, in contrast to *Guido*, as the court below concluded (Pet. App. 9), "there has been no arbitrary temporal division of a single conspiracy by an overeager prosecutor in order to facilitate multiple prosecutions." Petitioners were subjected to only one prosecution in which the two conspiracy counts were tried simultaneously. They are being retried on the distribution conspiracy only because

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denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F. 2d 637 (6th Cir. 1973). Even those courts that have held consecutive sentences impermissible, however, have not required the government to charge violations of the two statutes in a single count. See *United States* v. *Honneus*, *supra*, 508 F. 2d at 570.

the jury was unable to reach a verdict on that count at the first trial. See *United States* v. *Larkin*, 605 F. 2d 1360, 1367-1368 (5th Cir. 1979). "In short, this case lacks the inherent 'unfairness' that prompted the court to reverse the convictions in *Guido*" (Pet. App. 9) and provides no occasion for the exercise of any supervisory power the courts may enjoy.[4]

2. Petitioners' second claim (Pet. 27-36)—that the instant indictment represents prosecutorial over-reaching—is insubstantial. In rejecting this contention the court of appeals correctly observed (Pet. App. 10) that "[c]harging four separate offenses in violation of four separate and distinct criminal statutes cannot be termed prosecutorial overreaching. Nor does this appear to be a case where the prosecution covertly sought a mistrial for an opportunity to strengthen its case." Since petitioners were not convicted on any of the charges at the first trial, and in fact were acquitted on certain counts, we fail to perceive how they were victimized at that trial by prosecutorial overreaching. In addition, petitioners offer no evidence to support their claim that the prosecutor in the first trial deliberately provoked a mistrial by causing the jury not to reach a verdict on the remaining counts.[5]

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[4]Even if the decision below conflicts with *Guido*, this Court does not sit to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 352 U.S. 901 (1957).

[5]Petitioners suggest (Pet. 31) that the government intends to call additional witnesses at their retrial. The government represented in its brief in the court of appeals that co-defendant Salvatore Pepe, a fugitive at the time of petitioners' trial, has since pleaded guilty to one count of the indictment and has agreed to testify at the retrial. There is nothing improper in the introduction at a retrial of newly obtained evidence that was not presented at the first trial. See *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957). Furthermore, there is no indication, nor is it logical to assume, that the government deliberately manipulated the jury into a deadlock on some of the charges at the first trial in the hope that Pepe would be apprehended and convinced to testify for the government at the second trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980